

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MARIA I. LUNA,	)	
	)	
Claimant,	)	
	)	
v.	)	<b>IC 1998-504136</b>
	)	<b>2002-500813</b>
	)	
BALL BROTHERS PRODUCE,	)	
	)	
Employer,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
and	)	<b>AND RECOMMENDATION</b>
	)	
LIBERTY NORTHWEST INSURANCE	)	
CORPORATION,	)	Filed: January 18, 2008
	)	
Surety,	)	
Defendants.	)	
	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on March 6, 2007. Paul T. Curtis of Idaho Falls represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on October 6, 2007, and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided were:

1. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;

- b. Retraining; and
- c. Disability in excess of impairment.

In her briefing, Claimant stated the issues as:

1. What permanent impairment (PPI) rating is the Claimant entitled to in excess of the 3% whole person impairment awarded by Gregory West, M.D.?
2. What disability in excess of impairment (PPD) is Claimant entitled to?

### **CONTENTIONS OF THE PARTIES**

Claimant asserts that in addition to the 3% whole person impairment that Defendants have paid for her right upper extremity (1998 claim), she is entitled to an additional 8% whole person impairment for her low back injury (2001 claim). Further, Claimant asserts that she has sustained permanent partial disability of 21% inclusive of her impairment as a result of her two industrial accidents.

Defendants contend that Claimant has failed to establish that she suffered any permanent impairment as a result of her 2001 industrial injury. They argue that the causation opinion of Henry West, D.C., is not persuasive because it is based on Claimant's reporting, generally considered by her treating physicians to be unreliable, and not her documented medical history. Further, D.C. West's examination and opinion occurred more than five years after Claimant's 2001 accident, and within a year of an intervening motor vehicle accident. Defendants assert that impairment ratings given by Claimant's treating physicians, and based on contemporaneous medical evidence, are more credible than the opinion of D.C. West.

Finally, Defendants argue that Claimant is not entitled to any disability in excess of her impairment. She voluntarily left her time-of-injury employer, and records from the Industrial Commission Rehabilitation Division show that there are jobs available to Claimant in her labor

market and within her restrictions that pay as much, or more, than she was earning when she quit working for Employer.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;
2. Claimant's Exhibits 1 through 13 and 16 through 22, admitted at hearing;
3. Defendants' Exhibits A through S, admitted at hearing; and
4. Post-hearing depositions of Gregory West, M.D., taken May 29, 2007, and Henry G. West, D.C., taken April 12, 2007.

Objections made by Defendants at pages 22, 23, and 26 of D.C. West's deposition are sustained. All other objections are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

#### ***THE CLAIMANT***

1. At the time of hearing, Claimant was 49 years of age. She has resided in the Roberts, Idaho, area with her husband for over twenty years.
2. Claimant attended school through fifth grade in Mexico. Her English language skills are extremely limited; although an excellent interpreter was used during the hearing, the transcript reflects difficulty in communication. This is consistent with the medical records, which are replete with references to the difficulty her doctors had communicating with Claimant.
3. Claimant's work history since approximately 1988 consists of seasonal labor in the warehousing of agricultural products, primarily potatoes. She has worked as a sorter, an

inspector, and in various other facets of the fresh-pack potato industry for various employers in the Idaho Falls and upper valley.

4. Claimant worked for Employer during portions of 1988, 1989, 1991, and 1995 through 1998. It was while working for Employer in December 1998 that Claimant sustained the first of two industrial injuries that gave rise to this proceeding.

#### ***1998 INJURY AND MEDICAL CARE***

5. On December 3, 1998, Claimant first complained to Employer of pain in her right elbow. She sought medical care the same day and was diagnosed with right lateral epicondylitis. Claimant was referred to Ronald G. Mills, M.D., in January 1999 for on-going care of her right elbow complaints. Dr. Mills provided conservative care through July 1999, concluding at that time that Claimant might benefit from a percutaneous common extensor tendon release.

6. Claimant sought a second opinion from Dr. Gregory West, who agreed with both Dr. Mills' diagnosis and his recommendation for a surgical release. Claimant did not return to Dr. Mills, opting instead to have Dr. West do the epicondylar release. Dr. West performed the procedure in September. After a period of time off work immediately following the procedure, Claimant was released to light-duty work. Claimant's restrictions, essentially, were not to use her right hand or arm, and to do her work with her left hand and arm. Employer provided Claimant with light-duty work consistent with her restrictions. After Claimant had returned to light-duty work, she began to report elbow pain on the contra lateral left side.

7. Claimant underwent a functional capacity evaluation (FCE) in early January 2000. Claimant rated herself capable of only something less than sedentary work. Her FCE, however, demonstrated that she was able to work at a medium level of physical demand. Based on the FCE, Dr. West returned Claimant to her time-of-injury position sorting potatoes on a

work-hardening schedule that gradually increased her working hours over a four-week period.

8. On February 3, 2000, as Claimant neared return to a full-time work schedule, she began complaining to Dr. West of right-sided neck and shoulder pain that she said started immediately following her surgery. Dr. West ordered an EMG to evaluate those complaints.

9. Claimant also saw Dr. Mills on February 3, complaining about symptoms in her left elbow.

10. The EMG that Dr. West ordered was completed on February 17, 2000, and was interpreted as showing “. . . electrophysiologic evidence of very mild, bilateral median neuropathies at the wrists. The clinical significance of this finding, however, is uncertain.” Defendants’ Ex. J., p 233. The testing revealed no evidence of radial nerve involvement or right cervical radiculopathy.

11. Dr. West found Claimant medically stable on April 4, 2000. She was no longer working as a sorter, having switched to an inspector position that was easier for her. Dr. West noted that the job modification was the best therapy. He rated Claimant as having 7% upper extremity (3% whole person) PPI on April 13, 2000. Permanent restrictions included: “. . . okay to work as potato inspector. She can lift and sort potatoes at her own pace. She is not to repetitively sort potatoes.” Defendants’ Ex. E, p. 92.

### ***POST MMI MEDICAL CARE***

12. Claimant returned to Dr. Mills on June 1, complaining of pain and numbness in her right forearm and pain in her left elbow. Dr. Mills advised that he doubted there was much he could do for her right arm pain. He noted that two injections for her left elbow pain had helped only temporarily, but was concerned about a left elbow tendon release given the less-

than-total relief that she received from the same surgery on the right.

13. Dr. Mills followed Claimant's continuing complaints about her right arm and her left elbow. Dr. Mills tried a cortisone injection in the left elbow, but it did not provide long-term relief. Claimant wished to proceed with a surgical release on her left elbow.

14. Dr. Mills performed a left common extensor tendon release on August 31, 2000. Dr. Mills followed Claimant through her recovery. Her left upper extremity symptoms improved after the surgery, but Claimant continued to complain of increasing pain in her right upper extremity. Dr. Mills determined that Claimant was at MMI for her left upper extremity and he released her without restrictions related to the left elbow, and without any impairment, effective March 5, 2001.

15. Dr. Mills' records do not include any medical opinion as to the cause of Claimant's left elbow problems.

16. Claimant continued to see Dr. Mills for complaints about her right arm and shoulder pain. Dr. Mills repeatedly advised Claimant there was nothing he could do for her right arm complaints.

17. In July 2001, Claimant complained to Dr. Mills that her long and ring fingers on her right hand were locking up. Dr. Mills did not relate the triggering in Claimant's digits to her previous epicondylar release. He recommended that Claimant see a hand specialist. Surety arranged for Claimant to see William D. Lenzi, M.D., a well-known Boise hand specialist. Dr. Lenzi examined Claimant in September. He found her left upper extremity asymptomatic, and described the triggering he found in her right long and ring fingers as minimal. Dr. Lenzi diagnosed Claimant with mild to moderate extensor and flexor tenosynovitis. Dr. Lenzi did not believe that the diagnosis necessitated restrictions in her work.

18. Claimant's complaints regarding the fingers on the right hand continued through mid-December 2001. Dr. Mills tried an injection for the right finger complaints, without success. Dr. Mills could not identify the cause of Claimant's trigger finger complaints, but noted that they seemed to be aggravated by her work. He considered that Claimant might need an A1 pulley release to correct her finger triggering.

#### ***DECEMBER 2001 ACCIDENT AND MEDICAL CARE***

19. On or about December 20, 2001, Claimant slipped and fell at work. Within hours of the accident, she left for a scheduled trip. Claimant reported the accident to Employer upon her return, and a First Report of Injury or Illness was prepared on January 7, 2002.<sup>1</sup> The first report identifies injuries to her palm and her back.

#### ***2002***

20. Claimant first sought care for her palm and low back injuries on January 18, 2002. During a visit with Dr. Mills about the pain in her right forearm, and the right long and ring finger triggering that she was experiencing, Claimant advised Dr. Mills that she had slipped and fallen at work, banging her left hand and then striking a metal bar with her low back. She had been experiencing back and hand pain for about four weeks that was not improving. On exam, Dr. Mills appreciated pain at the base of the left thumb and in Claimant's back from the lower portion of the thoracic spine through her tailbone. He recommended physical therapy for both the hand and back.

21. Claimant returned to Dr. Mills on February 1, 2002. She reported that physical therapy had not helped either her left hand or her back. X-rays of her hand were negative for

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<sup>1</sup> There is some confusion as to the actual date of the injury. Defendants concede that the date of injury is immaterial. The evidence supports that the fall occurred on December 20, 2001. *See*, Defendants' Ex. D, p. 35 (handwritten chart note dated January 18, 2002 lists date as December 20, 2001).

fracture. She continued to complain about triggering in her right long and ring fingers. Claimant's left thumb and right hand complaints persisted through May 2002. Dr. Mills could neither explain nor palliate Claimant's numerous aches and pains.

22. At Surety's request, David Simon, M.D., conducted an independent medical evaluation (IME) of Claimant in February 2002. The IME focused on the injuries Claimant sustained as a result of her December 2001 fall. Claimant reported continuing pain in her low back, but no radiating pain into her legs. Dr. Simon noted exaggerated pain behaviors in his report to Surety. Dr. Simon concluded:

[Claimant's] diagnosis is "low back pain." There is no specific source of her pain that is identified. There is no evidence of a disc herniation or a lumbar radiculopathy. Assuming the injury occurred, it would have likely resulted in a soft tissue strain or contusion injury. There is evidence of psychologic overlay with her exaggerated pain behaviors and the inconsistencies on examination. The grip strength testing reveals that she is not exerting full effort.

Defendants' Ex. M, p. 256. Dr. Simon opined that physical therapy and anti-inflammatories were the appropriate treatment and recommended that her physical therapy needed to be advanced, but that she needed no further treatment. He found her at MMI and saw no objective reason to impose work or activity restrictions.

#### ***POST MMI MEDICAL CARE***

23. In April 2002, Surety authorized an A1 pulley release to treat her right hand triggering problems.

24. In mid-June 2002, Claimant returned to Dr. West for a second opinion regarding her left thumb and her right upper extremity. Hugo Arias, an exceptional interpreter, accompanied her. Dr. West attributed her left thumb pain to arthritis in her CMC joint and recommended a bone scan to see how advanced the arthritis was. He confirmed that she had triggering in her right long and ring fingers. Dr. West attributed Claimant's right forearm pain to

overuse in trying to compensate for the finger triggering. He recommended a trial of injections of Synvisc.

25. Following her visit with Dr. West, Claimant returned to Dr. Mills. He continued to follow her for the right hand, left thumb, and right forearm pain. On August 28, he performed surgery to release the long and ring fingers on Claimant's right hand, and also injected her left thumb to see if he could alleviate her left thumb complaints.

### **2003**

26. Dr. Mills followed Claimant's upper extremity complaints through March of 2003. Within two months of the injection into the CMC joint of the left thumb, the pain returned. Claimant continued to complain about her right forearm, and, for the first time since February of 2002, she complained about her right shoulder. In February, she started to have recurrent triggering in the right long finger. Dr. Mills was at a loss regarding treatment of Claimant's multiple and migratory complaints. He suggested another consultation with Dr. Lenzi.

27. In late March of 2003, Claimant returned to see Dr. West. She reported intermittent low back and shoulder pain, which she attributed to her December 2001 fall. She also reported on-going problems with her left thumb and right hand. Although Claimant brought an interpreter to the appointment, it was unclear to Dr. West how her work injury related to her hand pain. He recommended physical therapy and anti-inflammatories with injections in fingers and shoulder if the therapy did not lead to a dramatic improvement.

28. Claimant saw Dr. Lenzi on April 9. His exam focused on Claimant's left hand. He diagnosed flexor tenosynovitis, osteoarthritis in the CMC joint of the left thumb, and osteoarthritis in the DIP joints of the ring, long, and index fingers. The only diagnosis with any

potential connection to her work was the flexor tenosynovitis, for which he recommended anti-inflammatories and splinting. Claimant expressed her opinion that with all her problems, she could not continue to work. Dr. Lenzi saw no reason that Claimant could not continue working.

29. Claimant quit her job with Employer on May 2, 2003, for reasons not related to her work injury.<sup>2</sup> She was earning \$6.00 per hour on her termination date.

30. Claimant returned to Dr. Mills in early May 2003. She reported on-going symptoms in both hands, and for the first time reported bilateral numbness in her hands. Dr. Mills agreed with Dr. Lenzi's report, and opined that some of her hand complaints were consistent with carpal tunnel problems. He was at a loss as to the cause of most of Claimant's complaints, and apart from Dr. Lenzi's recommendation regarding anti-inflammatories, at a loss as to how to treat her. Claimant and Dr. Mills discussed her work situation, and he noted, "At this point I cannot see a major reason why she cannot work, although it may cause her pain and that maybe [sic] have to be dealt with." Defendants' Ex. D, p. 69. This was Claimant's last recorded visit to Dr. Mills.

31. Claimant returned to Dr. West in June, reporting right hand pain and numbness in her fingers. Dr. West diagnosed some recurrent triggering in her right long and ring fingers, and likely bilateral carpal tunnel syndrome (CTS). He injected her fingers, which relieved the triggering. Dr. West recommended bilateral EMGs. Claimant had the EMG and in August returned to Dr. West to discuss the results. Dr. West advised Claimant through an interpreter that she did have mild CTS. Claimant opted for conservative treatment, and Dr. West gave her

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<sup>2</sup> Claimant's primary reason for quitting involved conflicts with her supervisor and co-workers. She stated that co-workers were mean to her when she pointed out they weren't doing their job, and her supervisor was not supportive. Claimant did mention her health problems as a factor, but stated in her separation papers, "My doctor never advised me to quit or to change occupations or employer. I would not have quit if Samuel would have been better to work with. The main reason why I quit was due to Samuel's behavior." Employer's Ex. 17, p. 357.

cortisone injections.

32. In October, Claimant returned to Dr. West reporting minimal relief from the cortisone injections. Dr. West noted:

Per the interpreter, she has significant other complaints. I have talked to her about these in the past, but often we do not have a good interpreter, so we have not really gotten to the bottom of her problems. We discussed the issues with the interpreter and in the future she should have a medical interpreter with her when she comes to visit.

Defendants' Ex. E, p. 97. Dr. West went on to discuss Claimant's right shoulder pain and left wrist pain. Dr. West concluded that conservative treatment had not helped Claimant's CTS, and recommended a carpal tunnel release. He suggested that while she was under anesthesia, he would inject her right shoulder, and try to pin down the source of her other problems.

33. At Surety's request, Dr. Simon re-evaluated Claimant on December 9, 2003. She was accompanied by an interpreter. Dr. Simon was able to obtain a history with the help of the interpreter, and reviewed his own records along with records outlining Claimant's treatment by Drs. Mills and West subsequent to her last visit. Dr. Simon discussed the difficulty of pinpointing a diagnosis for Claimant's complaints, noting that even with a good interpreter, she was a poor historian. Dr. Simon agreed that there was objective evidence of CTS, but he did not believe it to be work-related, as it would not have been the result of her fall, and had continued to worsen long after she stopped working. He attributed her left hand pain to the osteoarthritis in her CMC joint of the thumb. He suspected that some of her symptoms might be related to diabetes.<sup>3</sup> Dr. Simon opined that Claimant was medically stable, that she was not a good candidate for carpal tunnel release, and concluded: "I do not think that there is any other medical treatment that will resolve [Claimant's] subjective symptoms. Dr. Simon found no objective

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<sup>3</sup> Diabetes was subsequently ruled out as a possible cause of any of her symptoms.

medical basis for PPI attributable to her December 2001 fall, and imposed no work restrictions arising out of that incident.

## **2004**

34. Claimant's last visit with Dr. West occurred on June 17, 2004. Claimant presented with a letter from her counsel setting forth a number of questions regarding her medical stability, impairment, restrictions, ability to return to work, suitability for retraining, and need for further treatment. He was also asked to review Dr. Simon's IME report. Dr. West's response to counsel's questions is a comprehensive review of her entire treatment history dating back to her 1998 industrial accident. Dr. West noted, as had other physicians, that Claimant "is an extremely poor historian; even with an interpreter. She complains of a lot of migratory pain. She has a very difficult time pinpointing any of her pain, specifically to her work related claim." Defendants' Ex. E, p. 100.

35. Dr. West's only disagreement with Dr. Simon's report concerned Dr. Simon's suspicion that diabetes was the cause of some of Claimant's complaints. Dr. West's answers to counsel's questions can be summarized as follows:

- Claimant was not at MMI because she had objective evidence of mild CTS and could probably benefit from some additional treatment. Claimant also had some mild impingement syndrome in her right shoulder. However, Dr. West could not relate either the CTS or the right shoulder impingement to either of Claimant's work accidents.
- Because Dr. West could not document an association between Claimant's CTS and shoulder complaints and her work, he did not believe it was appropriate to impose work restrictions.
- Dr. West thought it best that Claimant not continue to work in the potato

processing/warehousing industry because she had CTS that was exacerbated by that type of work.

- Dr. West opined that retraining might be useful, but again, could not say with any assurance that the need for retraining was due to a work injury.
- Finally, Dr. West opined that Claimant's complaints might be prominent enough to justify further treatment *if* they were compensable work injuries, but if they were not work-related, Claimant might choose to live with the symptoms.

36. Claimant's counsel arranged for a second opinion regarding Claimant's condition with Henry G. West, D.C. D.C. West's evaluation was limited to the effects of Claimant's December 2001 accident. D.C. West examined Claimant on November 28, 2006. Claimant reported to D. C. West that she injured her right shoulder, right elbow, and right knee in her fall, and was experiencing numbness and weakness in the right thigh and right hand. D.C. West examined Claimant and reviewed an MRI. He referenced a finding that Dr. Lenzi had made, but there is nothing in his report to indicate that he reviewed any other medical records in conducting his evaluation.

37. D.C. West made the following diagnoses:

- Chronic post-operative pain from her right lateral epicondylitis surgery, aggravated by the fall in December 2001;
- Chronic tenosynovitis of the flexor tendon of the right ring finger;
- Multi-level pre-existing osteoarthritis, aggravated by the December 2001 fall;
- Chronic right shoulder pain aggravated by the December 2001 fall;
- Chronic right knee pain secondary to the December 2001 fall, superimposed on pre-existing osteoarthritis;

- Chronic low back pain triggered by the trauma of the December 2001 fall, and paresthesia in her right upper thigh, triggered by the fall.

D.C. West stated that Claimant's subjective complaints were verified by clinical findings and the nature of her complaints was consistent with the nature of the reported injury. He determined that she was at MMI, and that impairment should be apportioned between the prior surgery for epicondylitis and the fall, but that the hand, back, and leg symptoms were strictly related to the December 2001 injury. He recommended permanent restrictions of no prolonged lifting, no lifting of more than twenty-five pounds, and avoiding repetitive hand movement.

### **DISCUSSION AND FURTHER FINDINGS**

38. In their briefing, Defendants presumed that Claimant's restatement of the issues indicated that she had abandoned her claims for additional medical care and retraining, and argued accordingly. The Commission finds, based on the absence of any argument at hearing or in Claimant's post-hearing brief, Claimant has failed to prove entitlement to medical care and retraining benefits.

### ***PPI***

39. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the

ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

40. Claimant's 3% whole person PPI for her right lateral epicondylitis is undisputed and has been paid. The real question in this proceeding is whether Claimant sustained additional permanent impairment as a result of her December 2001 slip and fall. The Referee finds that no additional PPI is warranted on the facts of this case.

41. Claimant received extensive treatment from both Drs. West and Mills during the period between her first and second industrial accidents, and for a number of years thereafter. During that period of time, and especially in the period following the December 2001 fall, Claimant reported a number of vague and migrating symptoms that could not be objectively confirmed, and could not be related by history to her slip and fall. Neither Dr. Mills nor Dr. West believed that additional restrictions or additional impairment was appropriate, and neither recommended that she should quit her job. During this period, Dr. Lenzi also saw Claimant on two occasions and he did not believe additional restrictions were appropriate and saw no reason why Claimant could not continue working for Employer. While it is clear that some work that Claimant had performed for Employer could aggravate her mild CTS, Employer had accommodated Claimant by moving her to an inspector position that did not require constant repetitive movement with her hands. This was the position she held when she voluntarily quit her job.

42. While D.C. West's basic diagnoses of Claimant's known conditions is consistent with the diagnoses of Drs. Mills, West, and Lenzi, his findings regarding causation are simply not credible. A review of the medical records that are contemporaneous with the December 2001 injury do not support D.C. West's findings that Claimant sustained injuries to her right shoulder,

hand, or knee in that fall. She did hurt her left hand, but her continuing problems were due to arthritis, not any acute injury. Similarly, she may have strained or bruised her low back, but there was no acute injury that could account for her continuing symptoms. D.C. West's opinion relies almost entirely upon the subjective reportage of Claimant, who was universally described as an abysmal historian, even when language difficulties were ameliorated with superior interpretation services.

### ***PPD***

43. The definition of "disability" under the Idaho workers' compensation law is:

. . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able

to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

44. Claimant has failed to carry her burden of proving that she is entitled to disability in excess of her existing 3% whole person impairment. Evidence regarding Claimant's employability is limited to the records of the Industrial Commission Rehabilitation Division (ICRD), which concluded in May of 2003 that nothing prevented Claimant from returning to her job as an inspector for Employer earning \$6.00 per hour (her time of injury wage). Further, a labor market study conducted contemporaneously showed that considering Claimant's age, education, restrictions, language limitations, and transferrable skills, there was employment available in her labor market at a wage that exceeded her time-of-injury wage. Claimant was not unemployed as a result of her injuries. Claimant was unemployed because she voluntarily quit her job. There is ample documentation in the record to show that in this case, Employer bent over backward to accommodate Claimant and to find positions that did not aggravate her verifiable injuries. The job of inspector was well suited to Claimant's abilities, but she chose to leave in what appears to be a fit of pique.

There is no basis on these facts to find that Claimant is entitled to any disability in excess of her 3% whole person impairment.

### **CONCLUSIONS OF LAW**

1. Claimant has failed to prove entitlement to additional medical care and retraining benefits.

2. Claimant is not entitled to additional PPI beyond the 3% whole person impairment for which she has been compensated.

3. Claimant is not entitled to any disability (PPD) in excess of her impairment.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 27 day of December, 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 18 day of January, 2008 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

PAUL T CURTIS  
598 N CAPITAL AVE  
IDAHO FALLS ID 83402

SCOTT HARMON  
PO BOX 6358  
BOISE ID 83707-6358

djb /s/\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MARIA I. LUNA,

Claimant,

v.

BALL BROTHERS PRODUCE,

Employer,

and

LIBERTY NORTHWEST INSURANCE  
CORPORATION,

Surety,  
Defendants.

**IC 1998-504136  
2002-500813**

**ORDER**

Filed: January 18, 2008

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove entitlement to additional medical care and retraining benefits.
2. Claimant is not entitled to additional PPI beyond the 3% whole person impairment for which she has been compensated.

3. Claimant is not entitled to any disability (PPD) in excess of her impairment.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 18 day of January, 2008.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_

James F. Kile, Chairman

/s/\_\_\_\_\_

R.D. Maynard, Commissioner

/s/\_\_\_\_\_

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/\_\_\_\_\_

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18 day of January, 2008, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

PAUL T CURTIS  
598 N CAPITAL AVE  
IDAHO FALLS ID 83402

SCOTT HARMON  
PO BOX 6358  
BOISE ID 83707-6358

djb

/s/\_\_\_\_\_